Journal of Air Law and Commerce

Volume 3 | Issue 1 Article 1

1932

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THE JOURNAL OF AIR LAW

Volume III JANUARY, 1932 Number 1

CONSTITUTIONALITY OF STATE REGISTRATION OF INTERSTATE AIRCRAFT

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New legal and constitutional problems continually confront our budding industry of air transport, and it is probable that posterity will look back at the present period as one of legal pioneering in this field. In so far as State attempts to regulate air transport are concerned, there is to be found in some of its phases similar stages of development in the early experience of railways and steamship lines in the United States. Transport by air is being imposed with regulations by the several States, seeking new sources of revenue as well as protecting their inhabitants under police powers against damage or injury inflicted by air transport or aircraft, that may be burdensome to the industry, and therefore harmful, unless checked early in their appearance. With the mounting costs of government, due to enlarged spheres of State activity in a modern industrial regime, and with excessive expenditures by State officials often for less legitimate purposes, it is but natural that the constituent States should be searching for sources of revenue in all directions. But under the prohibitions of the Federal Constitution relating to interstate and foreign commerce, which are a part of the legislative limitations of the States of the Union, regulations of air transport in interstate or foreign commerce must not transcend State power or offend constitutional inhibitions. I have pointed out in another connection[1] that, with the consent of Congress, the States may tax all manner of agencies engaged in interstate and foreign commerce, but until such assent is given, it must

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1. "Congressional Assent to State Taxation Otherwise Unconstitutional," American Bar Association Journal, December, 1931.

be carefully watched that the States do not through taxing and registering requirements, unduly burden interstate air transport, or enact unconstitutional aircraft legislation. For the States may harmfully experiment in regulation of our infant aircraft industry, and this appears to be due to the fact that apparently State legislators are not altogether clear on what basis this new industry of the air shall be regulated, or how far the States may regulate aircraft engaged in interstate or foreign commerce. The problems themselves are more or less new and strange when viewed from the type of industry with which they are already familiar. This being the case, opportunity is afforded now, early in the industry's career, for the component States to avoid the mistakes of the past as was often not done in the case of railroads and steamships, in regulating air transport in interstate or foreign commerce.

While, historically, as between railway regulations by the States and those now being placed upon air transport, there are similar stages in legal and constitutional development, it should be stated at once that the two types of business activity are not at all alike so as to make applicable to air transport analogous decisions relating to railways. Nor can similar analogies be drawn from motor bus operations between the States, or communication agencies, or Pullman service, or refrigerator transit by means of rail facilities. It is my judgment that some of the precedents that have come down to us on constitutional issues decided by the Federal Supreme Court relating to some of these types of activity in interstate or foreign commerce, are not pertinent to air transport. For carriage of passengers or goods by air is totally dissimilar in character from that by land, so far as State regulations and constitutional provisions of Federal control are concerned. In the case of air transport, *aircraft touch land only incidentally and temporarily, and require no artificial roadway, of any character.* No franchise is necessary to enable the aircraft owner or operator to use the air, for air is prepared by nature as a public or common highway for trade and intercourse.[2] No grants are necessary from the State, either of land or subsidies, for carrying on the air transport business in interstate commerce, unless it be in the exceptional cases of airports. If judicial utterance will lend greater authority to that which has already been stated, the remarks of Mr. Justice Bradley in *Pullman's Car Co.* v. *Pennsylvania,*[3] relating to the difference between

2. Cf. *Thomas H. Kennedy,* "The Certificate of Convenience and Necessity Applied to Air Transportation," 1 JOURNAL OF AIR LAW 76.
3. 141 U. S. 18, (1891).

rail and water transport, the language of which is equally applicable to air transport, may be pertinent in this connection. The learned justice said:

"Commerce on land between the different States is strikingly dissimilar in many respects from commerce on water; . . . A railroad is laid on the soil of the State, by virtue of authority granted by the State, and is constantly subject to the police jurisdiction of the State; whilst the sea and navigable rivers are highways created by nature, and are not subject to State control."[4]

This distinction is also quite emphatically brought out by Mr. Justice Gray writing the majority opinion in the *Pullman Case,* as follows:

"Between ships and vessels, having their situs fixed by Act of Congress, and their course over navigable waters, and touching land only incidentally and temporarily, and cars or vehicles of any kind, having no situs so fixed, and traversing the land only, the distinction is obvious. . . . Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them."[5]

If it be true that air transport is totally dissimilar from rail carriage so far as State regulatory control is concerned, but more analogus to water transport, having by-products of legal and constitutional relationships of a different character, it is submitted that we may have to build up basically new concepts, both constitutional and statutory for dealing with these problems, including those of State registration of interstate aircraft. Here is the opportunity of judicial statesmanship as it treats the problems of the network of legal relationships connected with the use of the air as a vehicle of commerce. Just as the Law Merchant and the Consolato del Mare created specialized forms of legal relationships for trade and maritime enterprises, and flourished alongside the Common Law but later becoming absorbed into it, so it is not improbable that we may have a similar air law development evolving out of a new juristic background, whose final product will also be of a specialized or unique character.[6]

A further point must be noted. In the intricate relationships between the Federal and State governments within the field of interstate commerce, where precise and rigid rules are impossible of

4. Supra, note 3, p. 32.
5. Supra, note 3, pages 23, 24.
6. *George B. Logan,* "The Present Status and the Development of Aviation Law," 2 JOURNAL OF AIR LAW 510.

application, the Federal Supreme Court has recognized that "practical" considerations must govern, that logic cannot always solve the problems that arise, nor logical deductions be drawn from decided precedents for adjudicating numerous and continually changing factors.[7] As Mr. Justice Bradley has said: "In order to give full and fair effect to the different clauses of the Constitution, the Court has felt constrained to recur to the fundamental principles stated and illustrated with so much clearness and force by Chief Justice Marshall and other members of the Court in former times, *and to modify in some degree certain dicta and decisions* that have occasionally been made in the intervening period."[8] And Mr. Justice Brandeis has reminded his colleagues as well as the legal profession that in the vast field of conflicting Federal and State regulations in interstate commerce, numerous decisions have been repudiated by later ones, or qualified or explained away, because it was seen that precedents earlier decided were either mistaken or not pertinent to new problems.[9] The attitude of the Federal Supreme Court, then, would seem to be one of open-mindedness when State regulations over interstate commerce agencies of any type are presented in constitutional issues; that decided precedents are not imperatively controlling; that the field is a dynamic one, rather than static; and that numerous practical factors must be given consideration as to whether or not State regulations unduly burden interstate commerce. *A fortiori,* it would seem that in the case of transport by air in interstate commerce, a by-product of the twentieth century in its phenomenal scientific and industrial achievements, protectory treatment against State power ought to be afforded by the United States Supreme Court.

New Constitutional Issues in State Aircraft Registration

Such being the peculiar character of air transport, and such the flexible outlook of the Federal Supreme Court in conflicting State and federal jurisdiction over interstate commerce, it becomes important to notice the latest type of State regulation of aircraft which gives rise to profound and important constitutional problems, as well as serious concern, to the infant aircraft industry in

7. I discussed the dynamic nature of this field briefly in a *Note,* "What Is Direct Restraint of Interstate Commerce?" 22 Illinois Law Rev. 197.

8. *Leloup* v. *Port of Mobile,* 127 U. S. 640, (1888).

9. *Di Santo* v. *Pennsylvania,* 273 U. S. 34, at pp. 42, 43 (dissenting opinion), (1927).

its future development. A number of so-called State "registration of aircraft" statutes have been recently enacted, all raising substantially similar constitutional problems with reference to air transport in interstate or foreign commerce. The Michigan Act provides:

"Section 2. *Registration of Aircraft.*

"All aircraft operating over the lands and waters of this State shall be registered with the secretary of State and a registration fee paid in accordance with this act except as provided herein.

"Registration fees shall be at the rate of two and one-half cents per pound of net empty weight of the aircraft, but shall not exceed one hundred fifty dollars nor be less than ten dollars for each aircraft. The net empty weight shall be as shown on the United States department of commerce license or registration certificate. Registration fees shall be in lieu of all property taxes, either general or local.

"No aircraft shall be issued a state aircraft registration certificate that does not have an appropriate and effective license or identification certificate as issued by the United States Department of Commerce. . . . No aircraft shall engage in commercial operations unless it has an appropriate and effective license issued by the United States Department of Commerce. . . ."[10]

The New Hampshire law provides:

"Section 1. *Aircraft Registration.*

"Resident owners of civil aircraft and non-resident owners intending to use in the state civil aircraft for gain or hire shall, prior to flying such aircraft in the state, register the same with the Public Service Commission and pay therefor a fee of ten dollars.

"Section 2. *Airmen Registration.*

"All resident airmen and any non-resident airman acting as such in the state for gain or hire shall, prior to operating civil aircraft, register with the Public Service Commission and pay therefor a fee of five dollars."[11]

The provisions of a recent West Virginia law, after providing for a State Aeronautics Board with jurisdiction over aircraft, are:

"Section 5. *Registration.*

"All owners of airplanes within the state shall, within thirty days after such board is created, make application to the board for a license to operate, and the registration of such airplanes. All pilots, student pilots, mechanics

10. Pub. Acts, 1931, No. 63.

11. House Bill 80, Approved April 2, 1931.

Michigan also has a provision for taxation on gasoline used by aircraft, as follows: *"Tax on aircraft gas, refund.* Section 2. A tax of three cents per gallon is hereby imposed on all gasoline sold or used in producing or generating power for propelling aircraft using any state, county, township or municipal or public airport or landing field in the State of Michigan . . . Provided, That a refund of one and one-half cents per gallon shall be made to airline operators who show proof that they are operating interstate on scheduled operations." (Pub. Acts, 1931, No. 160).

and instructors shall also make application for a license to the board, and the board is hereby given authority to charge a reasonable fee for those licenses issued, and which shall not exceed ten dollars."[12]

A Preliminary Problem of Construction

The breadth of these statutes must be carefully noted, for they in terms apply to "all aircraft," "resident and non-resident owners" of aircraft, to "all airmen," and to "any non-resident airman." Hence it must follow that aircraft used in interstate or foreign commerce and airmen thus engaged, would be subject to the statutory requirements of registration. In discussing a Tennessee statute imposing a tax on the use of sleeping cars in the State, the Supreme Court of the United States in 1903 said: "The Act in its terms applies to cars running through the State as well as those whose operation is wholly intra-state. It applies to all alike, and requires payment for the privilege of running the cars of the Company, regardless of the fact whether used in interstate traffic or in that which is wholly within the borders of the State. . . . We are not at liberty to read into the statute terms not found therein or necessarily implied, with a view to limiting the tax to local business."[13] A similar construction must be given the registration statutes relating to aircraft and airmen, i. e., inclusive of interstate and foreign commerce activities.

A more difficult problem arises as to the nature of the ground on which the States have sought to rest these registration regulations, whether on (1) their general power to tax personal property within the jurisdiction; (2) their power to grant privileges, with exaction of monetary returns, for operating within the confines of the State; or (3) their power to protect their inhabitants under police measures. It is believed that each power advanced for justification of the registration measures must be examined *seriatim* and separately, for different juristic and constitutional reasons are possible for each. It does not follow, of course, that because the registration requirements may be in part valid as police measures, they are *in toto* equally valid as taxing enactments; or that, if valid where the sums imposed or exacted are small, they are equally valid where they are large, for in the latter event they might be con-

12. House Bill 226, Approved March 16, 1931. The extent to which federal licenses of aircraft as well as airmen are required by the several States is discussed, with a list of such States and those imposing aircraft registration regulations, in an *Editorial* "The Trend Toward Federal Licensing," 2 JOURNAL OF AIR LAW 542.

13. *Allen* v. *Pullman's Palace Car Co.*, 191 U. S. 171, 173, (1903).

strued to be burdens on interstate air transportation. The validity of this analysis should appear as the various steps in the argument appear hereafter, and the effect of the cumulative marshalling of constitutional principles will likewise be more evident.

If Registration Requirements Be Regarded as Personal Property Taxes

If the registration requirements under discussion are regarded as taxes levied on personal property used by the business of interstate air transport, they must of course include aircraft or airmen merely flying occasionally, or even regularly, over the State's airspace, whether or not they come to rest upon the physical territory of the State, either momentarily or more or less permanently. Flying over one "corner" of a contiguous State while engaged in transit from State A to State B would subject the aircraft, as well as airmen, in interstate or foreign commerce to these tax requirements, if they be valid. Moreover, as airmen might be changed about over various routes from time to time, or if a plane should be taken out of a scheduled route to another such route, similar taxes would have to be paid by the aircraft owners on the plane as well as by the airmen engaged in its operation. It is a matter of common knowledge, that planes engaged in transport of either goods or passengers, differ in size and weight, having single or multiple engines, and registration requirements of airmen operating various types of planes would probably vary accordingly.[14] The fact that the registration statutes now being discussed impose only a flat tax on airmen does not argue that they will not, in future, be changed, for with the aircraft industry being only in its infancy, numerous variations in regulatory laws must be expected.

Now, if there are any sound analogies between air transport and railway transport, it is conceded that there is rather persuasive judicial authority in favor of these registration requirements regarded as personal property taxes, even though on property employed in interstate commerce; and all the more so in that the States requiring registration taxes are treating alike without discrimination both intra-state and inter-state businesses engaged in air transport. In *Pullman's Car Co.* v. *Pennsylvania*,[15] decided in

14. The Air Commerce Regulations of the Federal Government, as promulgated by the Department of Commerce, impose varying restrictions in the form of pilot licenses dependent on the weight class of the aircraft and the number of engines. Cf. *Aeronautics Bulletin No. 7*, ch. 5, "Licensing of Pilots."

15. 141 U. S. 18, (1891).

1891, a leading case involving taxation of the cars of the Pullman Company admittedly engaged in interstate commerce, the State of Pennsylvania imposed a tax on the capital stock of all corporations engaged in the transportation of freight or passengers within the State, by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars ran within the State bore to the whole number of miles in Pennsylvania and other States. The Supreme Court, Mr. Justice Gray writing the opinion, construed this capital stock tax as "in substance and effect a tax on the property." By a vote of 5 to 3 (Mr. Justice Brown not participating) the tax was sustained as a tax upon the personal property of the Pullman Company although engaged in interstate commerce. Mr. Justice Gray, after admitting that water carriage through a State could not be taxed by the State, said:

"The cars of this company within the State of Pennsylvania are employed in interstate commerce; but their being so employed does not exempt them from taxation by the State; and the State has not taxed them because of their being so employed, but because of their *being within its territory and jurisdiction.* The cars were *continuously* and *permanently* employed in going to and fro upon certain routes of travel. . . . The company has at all times substantially the same number of cars within the State, and continuously and constantly uses there a portion of its property."[16]

The dissenting opinion by Mr. Justice Bradley, concurred in by Field and Harlan, JJ., stresses the fact that the cars were only *transiently* within the State, and that water carriage, where ships were only *temporarily* within the State's confines and not regarded as subject to its jurisdiction, was analogous to the situation in which the Pullman Company's cars were found. The learned justice said, in part:

"I do not mean to say that either railroad cars or ships are to be free from taxation, but I do say that they are not taxable by those States in which they are only transiently present in the transaction of their commercial operations. . . . New York ships plying regularly to the port of New Orleans, so that one of the line may be always lying at the latter port, cannot be taxed by the State of Louisiana. No more can a train of cars belonging in Pennsylvania, and running regularly from Philadelphia to New York, or to Chicago, be taxed by the State of New York, in the one case, or by Illinois, in the other. If it may lawfully be taxed by these States, it may lawfully be taxed by all the intermediate States, New Jersey, Ohio, and Indiana. And then we should have back again all the confusion and competition and State jealousies which existed before the adoption of the

16. Supra, note 15, pp. 25, 26.

Constitution, and for putting an end to which the Constitution was adopted."[17]

And in *American Refrigerator Transit Co.* v. *Hall*,[18] the Court, by a 7 to 2 vote, sustained a Colorado tax which assessed a foreign car company upon the value of an *average* of 40 cars employed by it within the State at the time the assessment was made. The majority stressed the fact that the cars were constantly changing, but a *certain average* number were *continuously* within the confines of the State, and held that the "fact that such cars were employed as vehicles of transportation in the interchange of interstate commerce" would not "render their taxation invalid."[19]

Referring to these cases subsequently, in *New York ex rel. New York Central & H. Ry. Co.* v. *Miller*,[20] Mr. Justice Holmes said: "The same cars were *continuously receiving the protection of the State*, and therefore it was just that the State should tax a proportion of them. Whether, if the same amount of protection had been received in respect of constantly changing cars, the same principle would have applied, was not decided."

Reviewing the analysis thus far, it must be pointed out that the railway taxation cases are by a closely divided Court, that the majority stress the fact that a certain number of cars of the Pullman Company were *continuously* within the taxing State, which therefore received protection from the State, and that both majority and minority concede that the doctrine that personal property of interstate rail transport companies might be taxed was not applicable to water carriage, because this type of interstate or foreign commerce was wholly dissimilar to rail transportation, in that no franchise was necessary, no grants of property, etc.

The adjudications relating to the power of the several States to tax the personal property of businesses engaged in water transport must now, briefly, be examined. For it is here that, in my judgment, we must look for more applicable and pertinent doctrines of State taxation of interstate air transport or airmen engaged in interstate air transport. In *Hays* v. *The Pacific Mail Steamship Co.*,[21] the State of California imposed a tax on steamships within its confines, and 12 ships of the Pacific Mail Steamship Company, lying in the harbor of San Francisco, were levied upon. The facts

17. Supra, note 15, p. 33.
18. 174 U. S. 70, p. 82, (1899).
19. Supra, note 18, p. 82.
20. 202 U. S. 584, at p. 587, (1906).
21. 17 How. 596, at pp. 598, 599, (1854).

disclosed that the Steamship Company was incorporated under the laws of New York, and paid taxes there, but operated between New York, via the Isthmus of Panama, to San Francisco, and ports in Oregon. The Court struck down the California tax, on the ground that these vessels were not "properly abiding within" the limits of the State. Mr. Justice Nelson said, in part:

"Now it is quite apparent that if the State of California possessed the authority to impose the tax in question, any other State in the Union into the ports of which vessels entered in the prosecution of their trade and business might also impose a like tax. . . . She [the vessel] is within the jurisdiction of all or any of them [the ports] temporarily, and for a purpose wholly excluding the idea of permanently abiding in the State, or changing her home port. . . . They [the vessels] were not, properly, abiding within its [the State of California] limits, so as to become incorporated with the other personal property of the State; they were there but temporarily, engaged in lawful trade and commerce, with their situs at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid."[22]

In *Morgan* v. *Parham*,[23] the Court reaffirmed the doctrine of *Hays* v. *The Pacific Mail Steamship Company*. In this case, the steamship line was also incorporated in the State of New York, and regularly ran a line of steamers between the port of New York City and New Orleans, Louisiana, but the master of the particular vessel levied against in the State of Alabama, had enrolled the vessel at Mobile, Alabama, as a coaster, and his license had been renewed from year to year by that State. Despite this added fact, however, the holding was that the State of Alabama had no jurisdiction to tax the vessel lying in its harbors enroute to points outside the State, on the ground that the vessel had not become "incorporated into the personal property of that State, but was there temporarily only, and that it was engaged in lawful commerce between the States, with its situs at the home port of New York, where it belonged, and where its owner was liable to be taxed for its value."[24] There was a regular schedule of steamers in both of these cases. And in *Transportation Co.* v. *Wheeling*,[25] the Court held that the State where the steamship company was incorporated might tax the vessels as personal property, although duly enrolled and licensed

22. Mr. Justice Daniel dissented on the ground that the Court had no jurisdiction of the litigation. For general discussion of the tax problems presented by water-borne commerce in transit through a State, consult *Beale*, "The Situs of Things," 28 Yale L. J. 525; *Edwin Maxey*, "Situs of Personal Property for Purposes of Taxation," 3 Minn. Law Rev. 217.

23. 16 Wall. 471, (1872).

24. Supra, note 23, at pp. 476, 477.

25. 99 U. S. 273 (1878).

as coasting vessels under the laws of the United States, on the ground that the situs of the vessels was in the home port, and that the decisions which exempted the vessels from personal property taxes in States through whose waters they passed, were based not upon a denial to the States to impose duties of tonnage, without the consent of Congress, or a prohibition of levying taxes upon imports or exports, also without the consent of Congress, but solely because the vessels in transit had no taxable situs in such States.[26] It would also seem to follow from these decisions, that it is not because of Federal power over maritime matters that the States are denied power to tax vessels passing through the confines engaged in interstate or foreign commerce, for nowhere in the cases is this point urged; in fact, it is expressly stated by the Court that the States were not denied their powers of taxation merely because certain subjects were transferred to the Congress for regulatory supervision. This is important, in that it tends somewhat to confirm the view that interstate aircraft and their airmen are more, if not entirely, analogous to steamship transportation, because only *transiently* within the confines of the States through which transit takes place in interstate commerce.

It will thus be observed that the business of interstate air transport, in its legal and constitutional relationships, is strikingly similar to that of water carriage, and State attempts to levy taxes on the personal property devoted to the carriage. For in the cases relating to water carriage, there was, and still is, regularity of transit through the physical territory of the States, as well as more or less permanent sojourning of vessels in the harbors of the taxing States. The same factors are to be found in interstate air transport. While we are unable now to visualize all the developments of air transport between the several States, at present we find this type of business using the air space over the component States in much the same fashion as steamships use the harbor and river facilities of those States having such physical characteristics; there is no use made of the physical territory of the States, except for airports or air terminals, and undoubtedly the real estate could be taxed by the States, just as wharves and docks of interstate steamship lines are now so taxed; again, there is no grant by the States to interstate air transport of any easements or rights-of-way in the

26. *Case of State Freight Tax,* 15 Wall. 232 (1872); *Coe* v. *Errol,* 116 U. S. 517 (1886). The doctrine is well settled in constitutional law that mere transit through a constituent State does not subject the property to State taxation.

air space, just as the steamship lines operating in interstate commerce receive no such grants in navigable waters or ports within the jurisdiction of the several States; finally, there is only *temporary* and *transient* use of the physical territory by aircraft, also similar to steamship operation. In fact, the similarities between interstate air transport and water transport in interstate commerce are so great that the Federal Supreme Court would be justified in applying the precedents relating to steamship carriage to the air transport business, rather than those relating to railway carriage among the States, so far as taxing the personal property used by air transport business in interstate commerce is concerned. Undoubtedly, this would be a welcome solution of the problem to the air transport business, as well as to airmen engaged in that business, for it requires no stretch of the imagination to visualize to what great lengths the component States may go in imposing burdensome monetary requirements upon these agencies in interstate air transport, and especially so, if net weight be taken as the basis of tax; for, conceding the power in the States to tax the personal property thus used, there would seem to be no constitutional objection to the increase of the tax to larger and larger proportions as the business grew and the traffic was able to bear it. On the other hand, there are, of course, certain dissimilarities between water carriage and air transport, from their absolute physical differences, that are quite obvious, but it is submitted that these strengthen, rather than weaken, the claim of the air transport business to freedom from State taxation of its instruments. For air carriage uses the physical confines of the State to a lesser degree than does water carriage, in that once aircraft are above a minimum height space, they are considerably removed from contact with the State, even though technically they are still regarded as within the State's sovereign air space. If, also, we are to adopt either through Federal regulation or interstate compact among the constituent States, a so-called interstate air space at a certain height level, the aircraft will then be in the lane of interstate traffic, and not subject at all to the jurisdictional claims of the constituent States. However this may be, when, or if, adopted, as the future may decide, or however we may analyze the exact character of air transport as we know it, it must be conceded that there are sufficient precedents in the Supreme Court's repertoire of judicial decisions that would support the claim of interstate air transport and airmen engaged in this enterprise, to be free from State taxation, of the planes themselves, as well as the airmen.

If Registration Provisions Be Regarded as Privilege Taxes

A privilege tax may be imposed on the conduct of the business or on uses of property by the business. It is, of course, well established in American constitutional law, that none of the component States may exact privilege taxes from interstate businesses, as a condition of doing such business within the States. For interstate businesses have the constitutional right freely to enter the confines of the constituent States, and there to carry on their lawful business. To the extent that an interstate business carries on intra-state activities, of course, the doctrine is not applicable, and the several States may tax the internal activities, as well as require of them certificates of convenience and necessity, if the businesses are "affected with public interest." Looked at as a strictly privilege tax, the registration of aircraft and airmen statutes, with exaction of money payments, cannot be so expressly construed. But the necessary effect of the registration requirements of interstate aircraft may be such that they are tantamount to privilege taxes on the use of the property, if not the conduct of the business, for in the case of the Michigan statute, the empty net weight of the aircraft is used as a basis of computation of the monetary exaction, with a provision that not less than $10 shall be paid as a tax, which appears to be a purely arbitrary requirement, that might be construed as the imposition of a privilege of conducting interstate air transport, and not merely a sum to cover the costs of registration itself. And authority is not wanting in certain fields for so construing these statutes, and especially as they have been applied to motor vehicular transportation of an interstate character. A law of the State of Oregon, in 1921, provided that "Every owner of a motor vehicle * * * shall, * * * before he operates or drives the same upon the highways of this State" cause the same to be registered.[27] There was an exemption of non-resident owners. Solidly to buttress the statute, there was a blanket provision as follows: "The provisions of this act contained are declared to be an exercise of the police powers of the State of Oregon * * *"[28] Section 25 established the fees required upon registration and before issuance of licenses, to be paid to the Secretary of State, *"based on the light weight of such vehicle."* Motor vehicles, ex-

27. Gen. Laws of Oregon, 1921, sec. 4, ch. 371. A case of great importance holding a State statute taxing interstate busses according to carrying capacity was tantamount to a privilege tax upon the business of interstate transportation, and could not be sustained as a tax upon the user of the State highways, see *Interstate Transit* v. *Lindsey,* 283 U. S. 183 (1931).

28. Supra, note 27, sec. 51, ch. 371.

cept motor trucks, were then scheduled by weight, beginning with 1700 pounds or less, and ending with 5700 pounds. The fees were graduated from $15, as a minimum, to $97, as a maximum. A further provision was that "such registration and license fees imposed by this act * * * shall be in lieu of all other taxes and licenses" exacted by the State on these motor vehicles.

The striking similarity between the provisions of the Oregon law with respect to registration and taxation of motor vehicles and that relating to registration of aircraft must be acknowledged; in fact, it would almost seem as though the aircraft registration provisions are taken verbatim, with changes of a minor nature, from the Oregon, or similar, laws relating to motor bus transport. In the case of *Camas Stage Co.* v. *Kozer*,[29] suit in equity was brought by an interstate motor transport company, incorporated in the State of Washington, to enjoin the Oregon Secretary of State from enforcing the provisions of the Oregon law, as above set out, on the ground that it was beyond the power of the State to tax the interstate motor transport business. The Secretary of State for Oregon demurred, and a unanimous court sustained the demurrer, dismissing the action. The reasoning of the court was as follows:

"The legislative assembly was empowered to enact a law requiring a tax on privilege, and exempting such property from paying an ad valorem tax. . . . The privilege tax enacted for the registration of motor vehicles is used exclusively for highway purposes. . . . From the declaration of the legislative assembly and from the provisions of the law, it plainly appears that the end and aim in its enactment is the regulation of the motor vehicle for the public safety and the preservation of the highways of the State for the public welfare. . . . Under the Oregon Motor Vehicle Law, the value of the car has nothing to do with the amount of the registration fee exacted. The charge against an aged Ford capable of being driven upon the highways is as great as that upon that popular car fresh from the factory. . . . This could not be so if the registration fee were an ad valorem tax assessed against property."[30]

The court found additional support in its conclusions that negatively there was no evidence that the fee charged had been proved unreasonable, and that furthermore, Congress had passed no similar laws upon the subject, and hence the States might act with impunity in reference to interstate commerce, where such regulations only "incidentally" affected such commerce, being "lawful until Congress acts." Finally, the court found that complainant owed the State of Oregon certain moneys for the use of the high-

29. 209 P. 95, (1922).

30. Supra, note 29, at pp. 99, 100.

ways of the State, and not having made a tender of such sums, he came into equity with "unclean hands." Thus a variety of grounds were found by the court to sustain the ultimate conclusion reached, with the main factor in the judgment apparently being that the registration requirements were *privilege taxes for using the highways of the State,* even though the user was engaged in business of an interstate character. Although the evidence disclosed that complainant had four busses subject to the Oregon tax, and that the total tax would amount to $522, there is no record that the case was carried to the Federal Supreme Court. Perhaps, also, it was felt that that court had already clearly defined its position in the matter, as will presently appear.

Throughout the Oregon court's opinion, heavy reliance is placed by the court upon a number of decisions of the Supreme Court of the United States, that are well known to specialists in the field of constitutional law and taxation. They are, particularly, *Hendrick* v. *Maryland,*[31] and *Kane* v. *New Jersey.*[32] No mention is made of *Hess* v. *Pawloski,*[33] which was analogous to the two already mentioned, but not necessary to be considered by the court under the issues. Brief examination must now be made of these authorities. In the case of *Hendrick* v. *Maryland,* the State of Maryland imposed a requirement of registration on all owners operating motor vehicles upon the highways of the State. Fees were based upon horse-power of the vehicle, "six dollars when 20 or less; twelve dollars when from 20 to 40; and eighteen dollars when in excess of 40." The Supreme Court of the United States, by a unanimous vote, affirming the decision of the Maryland court sustaining the law, even against a non-resident motorist passing through the territory of the State, said (McReynolds, J.):

"The movement of motor vehicles over the highways is attended by constant and serious dangers to the public, and is also abnormally destructive to the ways themselves. Their success depends on good roads, the construction and maintenance of which are exceedingly expensive; and in recent years insistent demands have been made upon the States for better facilities, especially by the ever-increasing number of those who own such vehicles. As is well known, in order to meet this demand and accommodate the growing traffic, the State of Maryland has built and is maintaining a system of improved roadways. Primarily for the enforcement of good order and the protection of those within its own jurisdiction, the State put into effect the above-described general regulations, including requirements for registration and licenses. A further evident purpose was to secure some

31. 235 U. S. 610, (1915).
32. 242 U. S. 160, (1916).
33. 274 U. S. 352, (1927).

compensation for the use of facilities provided at great cost from the class for whose needs they are essential and whose operations over them are peculiarly injurious."[34]

The court also drew attention to the fact that Congress had not legislated on the subject matter, indicating thereby that if Congress had done so, other principles might govern the exercise of the State's power in the premises.

A year later, *Kane* v. *New Jersey* was decided, and the doctrine of *Hendrick* v. *Maryland* both approved and followed. The doctrine was also further explained. The New Jersey law provided not only for registration by the non-resident owner of his automobile, but also for graduated fees based on horse-power of the engine, and for the appointment of the Secretary of State of New Jersey as the owner's agent, on whom process might be served "in any action or legal proceeding caused by the operation of his registered motor vehicle, within this State, against such owner." There was a further provision for a fee required of the driver, also based on the number of horse-power of the machine. The sums collected were based, according to the evidence, on costs of inspection of the vehicles, as well as their regulation, and on the cost of maintaining improved roads. On suit brought, it appeared that Kane was a resident of the State of New York, who was arrested while driving his automobile *through* New Jersey, without having complied with the provisions regarding registration and the payment of the fees called for. The court found, as above indicated, and again upheld the registration requirements as reasonable regulations for use of the State's system of highways, there being further no national legislation upon the subject of registration of interstate motor carriers of non-residents or their use of the highways.

Are these authorities pertinent with reference to similar State regulations of interstate aircraft carriers or their airmen? Barring certain statements with reference to their validity as police measures, in the absence of congressional legislation, it would seem that we must give a negative answer to the question propounded. For, throughout the opinions, stress is laid on the fact that the States imposing these registration requirements were conferring a privilege upon the users of the highways of the States, in return for which the States might exact reciprocal duties in the way of monetary payments even upon non-residents entering and passing through, the

34. Supra, note 31, p. 622.

States, inclusive of those also engaged in interstate business with the use of motor vehicles. Now the nature of air transport is such that there is practically no user whatever of the State's artificial highways; in fact, there would ordinarily be *prohibition* of these highways by aircraft;[35] and where there is no privilege conferred on aircraft by the expenditure of State funds for their use, it would not seem equitable that the State exact from them money payments, in the form of taxes at least, of this character. Of what harm to the State's system of highways can there be if aircraft range in weight from 4500 pounds (a present typical single engine plane) to 50 tons of the type of the DO-X? or whether the plane is the possessor of two, three, or four engines, or carries 5 passengers or 45 or 200? And if a registration statute is not based on weight, but on a flat or minimum tax, where is the reciprocal protection given by the State to air transport when these are only *transiently* within the State, and only *temporarily* touch the physical territory of the State? And how would a flat tax be computed on interstate aircraft that only cross the State in interstate air lanes but never even use airports provided by the State or subordinate divisions of the State? If it be said that the State may tax aircraft in interstate commerce because of the privilege conferred by the State to use airports provided by the State, the answer is, first, that the statutes as to registration are not thus expressly restricted, and that the usual practice now is to make special charges to aircraft by municipal corporations; and secondly, there would seem to be no objection to aircraft using their own airports, as about 40% of airports are now so owned, and thirdly, because in the latter event interstate air transport companies could then most strongly claim that they were only temporarily within the State, within the steamship cases, and could not be taxed on their planes, but should be so taxed only as owners of the real estate on which the airports were situated.

Finally, if it should be determined that, after all, this privilege tax is for users of public airports, whether owned by the State or one of its subdivisions, it is quite possible that such a tax would be, in effect and in substance, a fee exacted for the privilege of such use of aircraft in interstate commerce, and therefore invalid, as being a direct burden on the commerce. As said by the Supreme Court of the United States, in *Helson and Randolph* v. *Kentucky*,[36] rendering invalid a law of Kentucky, imposing a 3 cent tax on all

35. See U. S. Dept. of Commerce regulations on this point.
36. 279 U. S. 245, (1929).

gasoline sold at wholesale within the State, without making exemptions for interstate businesses using the gasoline:

"Regulation of interstate and foreign commerce is a matter committed exclusively to the control of Congress, and the rule is settled by innumerable decisions of this Court, unnecessary to be cited, that a State law which directly burdens such commerce by taxation or otherwise, constitutes a regulation beyond the power of the State under the Constitution. . . . A State cannot 'lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on.' . . . While a State has power to tax property having a situs within its limits, whether employed in interstate commerce or not, it cannot interfere with interstate commerce through the imposition of a tax *which is, in effect, a tax for the privilege of transacting such commerce.*"[37]

If a tax as small as 3 cents per gallon of gasoline, and on sale at wholesale only, is held to be a burden on an interstate commerce agency using such gasoline, because "in effect a tax for the privilege of transacting such commerce," may it not equally forcefully be argued that a tax directly on the aircraft equipment used in interstate commerce, based on net weight of the aircraft, is likewise a direct restraint, a burden, on such air transport in interstate commerce? Looking at the substance of the registration requirements so far as they demand the payment of money or fees, with no showing that they bear a relationship to the costs of registration, it would seem an affirmative answer must be given to the question raised.[38]

If Registration Statutes Be Regarded as State Police Measures

At first blush, it will be said that these registration requirements of interstate air transport are valid exercises of the police power of the constituent States, to protect their inhabitants against the possibility of loss of life and limb and the destruction of property by the use of aircraft below standard and at the hands of incompetent airmen.[39] This view assumes, of course, that there are

37. Supra, note 36, p. 249.

38. And see Comments by *C. R. Mangham,* "Taxation by State of Gasoline Used in Interstate Commerce," 2 JOURNAL OF AIR LAW 600.

39. The viewpoint is expressed, in the orthodox fashion, in 12 Corpus Juris, p. 13, as follows: "The States may, as long as they do no more than legitimately exercise their reserved police power, enact laws which will be valid, although they may incidentally affect interstate commerce. Local laws of the character mentioned have their source in the powers which the State reserved and never surrendered to Congress of providing for the public health, the public morals, and are not within the meaning of the

no federal regulations fixing standards of safety of aircraft, or qualifications on the part of airmen, engaged in interstate air transport. It further assumes that the registration requirements are but "incidental" restraints on interstate commerce by air carriers. The second assumption, however, is purely an assumption; the first hypothesis is a matter of discoverable fact by consulting available statutes enacted by the Federal Congress, with perhaps regulations of an administrative character supplementing the statutes.

The first, and large, problem is, whether or not an alleged, or even an admitted, power of police exercised by the State, is really a direct and substantial burden upon the interstate commerce of the business affected, or only a mere "incidental" one. No definite criteria of predicability are here available to solve our problem. It may be regrettable, in some aspects, that this is the case, but in other fields of law where also standards are in use, similar unfortunate results are present. The whole subject-matter within whose field the standards operate, is too intricate and complex, and too ramifying in character, due to a vast net work of legal relationships, to permit of precise and rigid application of rules of law or of constitutional construction.[40] The standard, rather than the rule, serves the useful function of somehow practically balancing all the interests involved with the greatest degree of justice of which the subject is capable. But it leaves prediction uncertain, and gives enormous power of judicial creation and judicial omnipotence.

For example, in *Di Santo* v. *Pennsylvania*,[41] already referred to, a statute of the State of Pennsylvania, required "all persons, other than railroad or steamship companies, who engaged within the State in the sale of steamship tickets, to obtain a license by giving proof of good moral character, paying a small annual fee, and filing a bond as security against fraud and misrepresentation

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Constitution and considered in their own nature regulations of interstate commerce." This generalized summary is absolutely worthless as a precise test or solution of the question, whether or not State registration laws are valid police measures, for the whole point turns on when a given State enactment is only "incidental" and when it is really an exercise of the police power of the State. The slot machine or "rule of thumb" method is inadequate in solving legal problems. Cf. *Pound,* "Mechanical Jurisprudence," 8 Col. L. R. 605.

40. Mr. Justice Stone, dissenting in *Di Santo* v. *Pennsylvania,* complains that the "traditional test of the limit of State action by inquiring whether the interference with commerce is direct or indirect seems to me too mechanical, too uncertain in its application, and too remote from actualities, to be of value. . . . We are doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached." (P. 44.)

41. Supra, note 9.

to purchasers." There was no similar federal regulation in the field. Now, if anything could be said to be a valid exercise of the police power of the State of Pennsylvania, such a measure ought to be. But by a vote of 6 to 3, a majority of the Federal Supreme Court struck the statute down as being a "direct burden on foreign commerce," and not sustainable as "a proper exercise of the State police power to prevent possible fraud." Mr. Justice Butler, writing for the majority, further said:

> "A State statute which by its necessary operation directly interferes with or burdens foreign commerce is a prohibited regulation and invalid, regardless of the purpose with which it was passed. . . . The license fee and other things imposed by the Act on plaintiff in error, who initiates for his principals a transaction in foreign commerce, constitute a direct burden on that commerce."[42]

The dissenting opinions call attention to numerous decisions by the Court, some holding police regulations of the States to be "direct" restraints on interstate or foreign commerce, and others only "indirect," but none of them laying down definite criteria by which these variable results were obtained; thus indicating that it was largely a matter of individual opinion of the justices, as to what ought to be the rule, in view of all the possible circumstances in each given case presented for adjudication. Under such a state of affairs, how can it be positively asserted that registration requirements imposed on interstate aircraft are not "direct" burdens on interstate commerce? Nor can it, equally logically, be said to be positive that these are not police measures. The essential point is that the matter is left open to the Supreme Court of the United States, and is by no means so clear as a wooden application of a traditional formula might seem to indicate. Being thus left open, and because aircraft engaged in interstate commerce do possess such totally dissimilar characteristics from other types of interstate business, it is at least probable that this business might be able to avail itself of such formula by ridding itself of onerous State regulations of this character.

But while this phase of the police regulation is more or less doubtful, because of the taxing features of the registration requirements, there is a possibility that if the sums levied were only large enough to cover the cost of inspection and regulation of aircraft and airmen, such measures could be sustained under police powers of the constituent States. This assumes, of course, that we shall

42. Supra, note 9, p. 37.

not in the future prohibit all regulation by the component States even of intra-state business of air transport, on which there is some question beyond the purview of this discussion. It is barely possible, for instance, that after the analogy of regulations of radio broadcasting, federal control may gradually extend so far as even to include intra-state activities of radio broadcasting.[43] Now it might be that air transport is somewhat analogous to the activities occasioned by the use of the radio, so that all State control of aircraft would be gradually prohibited through ever-widening federal control. I am not, however, arguing here for this view.

Conceding, then, for purposes of argument, that the suggested remodification of State registration laws of aircraft engaged in interstate commerce would support the exercise of the State's police power, nonetheless, there is yet another vital objection to the constitutional validity of State registration of interstate air transport, in that federal regulation has already covered the subject-matter to the necessary exclusion of the individual States. An analogy drawn from State regulation of railroads, under admitted police powers of the State, is here in point, but only as a judicial decision illustrating the degree of control by the several States, but not as an evidence that the railway business is similar to that of air transport in interstate commerce.

Before discussing the applicable decisions relating to railway regulation of safety devices and equipment on interstate railroads, consideration must first be had of the exact nature of the federal statute relating to aircraft and airmen engaged in interstate commerce. An Act of the 69th Congress, entitled "An Act to encourage and regulate the use of aircraft in commerce, and for other purposes,[44] approved May 20, 1926, empowers the Secretary of Commerce to make rules and regulations for registration of aircraft, involving licensing, inspection, and operation, and licensing of air pilots and mechanics. There is further authority "to establish air-traffic rules for navigation, protection, and identification of aircraft, including rules as to safe altitudes of flight and rules for the prevention of collisions between vessels and aircraft." (Section 3.) Section 11 of the Act of 1926, in part, specifically provides:

"It shall be unlawful . . . to navigate any aircraft . . . in interstate or foreign air commerce unless such aircraft is registered as an aircraft of the United States." (a) (2).

43. Cf. *Thad H. Brown,* "State Regulation of Radio," 2 JOURNAL OF AIR LAW, 35, and *John W. van Allen,* "State and Municipal Regulation of Radio," 1 *Journal of Radio Law* 35.

44. Public Document No. 254.

"It shall be unlawful . . . to serve as an airman in connection with any aircraft registered as an aircraft of the United States . . . without an airman certificate or in violation of the terms of any such certificate." (Sec. 11, a, 4.)

Acting under the authority thus conferred, the Department of Commerce has issued numerous regulations relating to licensing of aircraft, airworthiness, inspection as to safety devices, before and after flight, operation of aircraft, including devices for fire-extinguishment, first-aid kits, altimeters and log-books, marking of licensed and unlicensed aircraft by symbols, marks and names of owners, licensing of pilots to determine their fitness to operate landplanes and seaplanes, of single engines or multi-engines, character and age and citizenship of pilots, flying experience, physical qualifications, rules governing night flying, solo flying, licensing of mechanics, etc.[45]

Thus it will be noted that the Federal Congress has pretty well covered the subject of safety devices of aircraft, as well as standards of qualification of airmen, at least so far as both are engaged in interstate commerce. Does this fact, then, of federal control, negate action of similar character as to registration on the part of the States? It would appear quite clear that an affirmative answer must be given to this query. The pertinent analogous decisions are strong on this point.

In *Napier* v. *Atlantic Coast Line Railway,*[46] the question at issue was the constitutional validity of two State statutes, one of Georgia and the other of Wisconsin, imposing certain requirements upon locomotives engaged in interstate commerce, in the interests of safety to the workingmen employed on such locomotives. The Georgia statute required every locomotive operating in the State to be equipped with an automatic door to the fire-box of the locomo-

45. I refrain from entering upon detailed discussion of the question, whether the Air Commerce Act of 1926 is beyond the constitutional powers of Congress, in that it authorizes the Secretary of Commerce to establish air-traffic rules that are to apply, even though aircraft are not "engaged in commerce." (Sec. 3, e. [See "Statement of Managers Accompanying Conference Report, Air Commerce Act of 1926, as found in "Air Commerce Regulations," p. 28].) The First Employers' Liability Act of the Congress, enacted 1906, was held vulnerable to constitutional attack because lacking express qualifications restricting federal jurisdiction to claims of injured or deceased railway trainmen employed by interstate rail carriers arising out of acts of interstate transportation at the time of injury or death. *First Employers' Liability Cases,* 207 U. S. 463, (1908). But in those cases there was no showing that, as to interstate commerce, the Act was at all separable; if so, it might have stood as to its valid parts. Cf. *El Paso & N. Ry. Co.* v. *Gutierrez,* 215 U. S. 87, (1909).

46. 272 U. S. 605, (1926).

tive, that of Wisconsin requiring all locomotives to have as their equipment cab-curtains, both types of requirements expressly said to be for the safety and comfort of the workingmen. It appeared in evidence that the Federal Boiler Inspection Act of 1911,[47] had required safety devices of *boilers* of locomotives engaged in interstate commerce, for protection of both the workingmen employed on locomotives, as well as the traveling public using interstate rail highways. During the period of narrow restriction of this Act to boilers only, there was decided *Atlantic Coast Line Ry.* v. *Georgia,*[48] in which it was held that the State of Georgia might constitutionally require certain types of headlights for locomotives within the State, in view of the fact that the Congress, under the Boiler Inspection Act, had not dealt with locomotives as a whole, but only with boilers; or, in other words, had not covered the subject completely. After that decision, probably on account of the inconvenience and burdens that might arise to railways engaged in interstate commerce, if the several States might require varying impositions as to locomotive equipment, the Congress amended, in 1915, and again, in 1924,[49] the Boiler Inspection Act, by including "said locomotive, its boiler, tender, and all parts and appurtenances thereof." This was the situation when the *Napier Case* arose. The two statutes of the States of Georgia and Wisconsin were held repugnant to the Federal Constitution, in that the Congress had dealt with the subject-matter in this field of concurrent jurisdiction, and that therefore, the States were without power, even under their police jurisdiction, to regulate the matter of safety devices of locomotives when engaged in interstate commerce. And it should be emphasized that, as a matter of fact, the Interstate Commerce Commission, which was empowered under the amendments to the Boiler Inspection Act, to draft regulations for the entire locomotive, had not yet done so, so that, in fact, there would have been no conflict between similar State regulations and federal requirements. But the test was, not whether these similar regulations might co-exist in the same field, but, on the contrary, whether the subject-matter had been dealt with on the part of Congress. Mr. Justice Brandeis, writing for an unanimous Court, said:

"The federal and the State statutes are directed to the same subject—the equipment of locomotives. They operate upon the same object. . . . We hold that State legislation is precluded, because the Boiler Inspection

47. 36 Stat. at L. 913.
48. 234 U. S. 280, (1914).
49. 38 Stat. at L. 1192, and 43 Stat. at L. 659.

Act, as we construe it, was intended to occupy the field. . . . The standard set by the Commission must prevail, [and] requirements by the States are precluded, however commendable or however different their motives."[50]

It is, of course, not an easy matter to determine when federal regulation has covered the subject-matter. In *New York Central Ry.* v. *Winfield,*[51] the holding was that the Congress, in legislating under the Federal Employers' Liability Act of 1908, in favor of claimants injured or killed while employed on interstate railways, in an act of interstate commerce at the time of injury or death, had covered the field of railway injuries, even though the Act required negligence as the gravamen of the action, in other words, required proof of a tort on the part of the employer or his servants, and was not inclusive of *accidental* harms. Mr. Justice Brandeis dissented, in which Clarke, J., concurred, being of the opinion that the test should be absence of conflict between federal and similar State regulations as found in workmen's compensation legislation. In the *Napier Case,* however, Mr. Justice Brandeis adopts the more acceptable, and now established, test, whether or not the Congress had covered the subject-matter, saying, "whether Congress has entered a field must be determined by the object sought through the legislation, rather than the physical elements affected by it."

The pertinency of these judicial authorities drawn from regulations by the States, under their police power, of certain equipment of interstate railways, must now be clearly apparent, in so far as the States may legislate with reference to equipment of aircraft and qualifications of airmen by means of registration requirements. Congress has covered the subject-matter, even though in all the details of regulation there may not be apposite concrete requirements such as the several States might have drafted in advance of federal regulation. The intention of Congress has been expressed by the enactment of the legislation, and it is of no consequence that the legislation may not yet have gone into effect. A most illuminating decision apropos of this thought is that of *Northern Pacific Ry* v. *Washington,*[52] where a State statute was stricken down because covering the same subject-matter as that on which the Congress had legislated, but where the congressional legislation had not yet gone into effect.

Hence, while State registration of aircraft and qualifications

50. Supra, note 46, pp. 612, 613. And see *Note,* "The Federal Boiler Inspection Act and State Regulation," 21 Illinois Law Rev. 815.

51. 244 U. S. 147, (1917).

52. 222 U. S. 370, (1912).

of airmen engaged in interstate commerce must be held constitutionally invalid, because the Congress has occupied the field, it does not follow that other types of State regulation of aircraft, engaged in internal business, would be equally invalid. The Congress may legislate, as it has done so, with respect to the equipment of entire locomotives of interstate railways as safety devices, or for that matter, with respect to rolling-stock of the railways generally; and the Congress has legislated with respect to fixation of rates by interstate railways; but none of these attempts could be used as precedents to negate all State action as to the *business* of interstate railways, such as the several States requiring interstate trains to make stops at certain places, or to elevate grade crossings.[53] Perhaps this observation is beyond the scope of this discussion, and perhaps the Congress may, after all, by express statutory requirement, draw unto itself all regulation of even intra-state air-traffic or air-transport. However this may be, the conclusion reached here is that only so far as air-transport in interstate commerce is concerned, similar regulations by the constituent States as those imposed by the Congress, are constitutionally null and inoperative.

Summary and Conclusion

From whatever viewpoint considered, therefore, it would seem that so far as interstate commerce by air-transport is concerned, the several States have exceeded their powers in imposing registration requirements, with fees, upon aircraft and airmen. As fees laid upon the aircraft, regarded as personal property taxes, the water-carriage cases conferring immunity to steamships in transit

53. On this point, cf. *Missouri Pac. Ry.* v. *Norwood,* 51 Sup. Ct. 458 (1931), and *Interstate Busses* v. *Holyoke Ry.,* 273 U. S. 45, (1927). A vital problem arises, in this connection, with reference to the Illinois Aeronautics Act, approved July 9, 1931, which requires within sixty days that "all pilots any owners and/or operators of all aircraft shall register the Federal licenses of said airmen and of said aircraft in such manner as the Commission [of Aeronautics] may by regulation prescribe." And "for the issuance of each certificate of registration of each Federal license for pilots and aircraft, *no fee shall be charged.*" It is, however, made a misdemeanor not to register the license. In my judgment, if there should be an attempt made to apply this provision to interstate aircraft and airmen, as I understand there is not, the absence of a fee would not save this registration requirement from unconstitutional attack, for the provision of registration in so far as it might affect interstate air transport would be a "direct" burden on commerce of that business, within the doctrine of *Di Santo* v. *Pennsylvania,* or *Napier* v. *Atlantic Coast Line Ry.* as invading a field already covered by Congress which has itself required registration. Probably, although I do not desire irrevocably to commit myself, the requirements of other parts of the Illinois Act, to the extent it is separable, would be valid as to intrastate flying.

through the several States, would appear to be quite analogous, and it should be emphasized that the steamship cases created the doctrine of tax immunity, even where there were regular scheduled operations, and not merely occasional passage through a State's jurisdiction. If the registration requirements be looked at as privilege taxes, either for use of franchises conferred by the State, or as taxes upon the conduct of interstate air-transport, again State power must be held nugatory so far as it attempts to regulate interstate aircraft and airmen. Finally, even as police measures, the power of the State is interdicted, in that there is complete federal regulatory control over the subject-matter. But the business of interstate air-transport, as a business, of course, might still be regulated by the constituent States, provided the regulations imposed did not burden interstate commerce.

On principle, it would seem that a strong argument could be made for more and more *federal,* as opposed to *State,* regulation of interstate air-transport, on the general theory that aircraft, like radio, electricity, and communication of intelligence as businesses, does not know State lines; in fact, the States are only geographical expressions from this standpoint. Advantages of one uniform system of regulation far outweigh State regulations, even though the several States are showing a tendency to incorporate federal requirements into State law. This would not be necessary, except as perhaps to intra-state business of air-transport, and could not be done if federal control is paramount. Applying to the problems of State registration of aircraft and airmen engaged in interstate commerce, the decisions as they have come down to us at all analogous, the cumulative effect of the argument is, that the States are without power thus to compel registration of interstate aircraft and airmen.